

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**BROWNING FERRIS INDUSTRIES OF
CALIFORNIA, INC. d/b/a BFI NEWBY
ISLAND RECYCLERY AND FPR-II, LLC
d/b/a LEADPOINT BUSINESS SERVICES,
A JOINT EMPLOYER**

and

Case No. 32-CA-160759

**SANITARY TRUCK DRIVERS AND
HELPERS LOCAL 350, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS**

**CHARGING PARTY’S MOTION TO STRIKE THE GENERAL COUNSEL’S
STATEMENT OF POSITION IN RESPONSE TO THE REMAND
OF THE D.C. CIRCUIT**

INTRODUCTION

Charging Party, Teamsters Local 350, hereby brings this motion to strike the General Counsel’s Statement of Position in Response to the Remand of the D.C. Circuit (“GC’s Position Statement”). Charging Party brings this motion on the grounds that the GC’s Position Statement exceeds the scope of the mandate from which the Board has no power or authority to deviate, that the arguments have been waived, that the arguments defy the Court of Appeals and the law of the case and that the Statement constitutes an untimely and improper motion for reconsideration.

I. The General Counsel's Statement of Position On Remand Exceeds the Scope of the Remand and Is Actually a Motion for Reconsideration

The General Counsel frankly acknowledges that his statement of position on remand is actually an improperly filed motion for reconsideration. The D.C. Circuit expressly upheld the joint-employer standard articulated by the Board and remanded to the Board solely for further articulation of two discrete and specific aspects of the approved joint-employer test. Yet the General Counsel barely addresses the issues the Court of Appeals asked the Board to address.

Instead of addressing the discrete issues on remand, the General Counsel's first argument, is that the D.C. Circuit's decision "permits the Board to reconsider [the joint employer] standard now." GC's Position Statement at 3. Four pages later, the General Counsel again admits that he urges the Board to exceed the scope of the remand, "although the D.C. Circuit's decision remanding this case did not squarely address the new standard,¹ the Board should use this opportunity to return to its long-standing prior standard for a joint employer finding." GC's Position Statement at 7. And the General Counsel reiterates, "the Board should return to its long-standing previous standard for a finding of joint employment." GC's Position Statement at 16.

The General Counsel then proceeds to make a set of arguments that range far outside the scope of the remand and urge the Board to reconsider aspects of its prior ruling that were either affirmed or not addressed by the Court of Appeals. The General Counsel urges the Board to hold that potential control and indirect control cannot be the sole bases of a joint employer finding, *id.* at 3-4; to hold that direct control that is limited and routine is not relevant, *id.* at 18-19; and to hold that terms in a contract between two

¹ Needless to say, the D.C. Circuit did address the new standard and expressly upheld the two aspects of the standard that were challenged.

business establishing terms of employer are not relevant, *id.* at 19. In fact, the General Counsel proposes a joint employer standard far narrower than the Board or any court has ever endorsed, suggesting that an entity must control all essential terms of employment in order to be a joint employer. *Id.* at 19-20. Indeed, the General Counsel goes even beyond that to nullify the concept of joint-employment and argue that only one employer can have an obligation to bargain with a set of employees. *Id.* at 23. These are arguments that the General Counsel did not advance before the Regional Director, the Board or the Court of Appeals. They have been waived.

Even if the arguments had not been waived, they are far beyond the scope of the remand. See Charging Party's Statement of Position on Remand at 1-3.

Finally, the Court of Appeals decision, upholding the Board's joint-employer standard, specifically its consideration of indirect and reserved control, constitutes the law of the case that is binding on the Board. For the Board to follow the General Counsel's lead here would be to defy the Court of Appeals. *See, e.g., C.E. Wylie Const. Co.*, 310 NLRB 721, 720 n. 4 (1993); *cf. Role Models America, Inc. v. Geren*, 514 F.3d 1308, 1311 (D.C. Cir. 2008) (a lower court has "no 'power or authority to deviate from the mandate'" issued by an appellate court) (quoting *Briggs v. Pa R.R. Co.*, 334 U.S. 304, 306 (1948)). "The mandate rule is a 'more powerful version' of the law-of-the-case doctrine, which prevents courts from reconsidering issues that have already been decided in the same case." *Id.* (quoting *Indep. Petroleum Ass'n of Am. v. Babbitt*, 235 F.3d 588, 597 (D.C. Cir. 2001)).

II. The Motion for Reconsideration Is Both Untimely and Improper

Because the General Counsel's statement of position on remand is actually a motion for reconsideration, it must be treated as such under the Board's rules. It is both untimely and improper under those rules.

Rule 102.48(c)(2) provides that a motion for reconsideration must be filed within 28 days of the service of the Board order or decision at issue. That time has long passed here.

Moreover, Rule 102.48(c)(1) provides that a motion for reconsideration may only be filed based on "extraordinary circumstances." The General Counsel's filing does not acknowledge this high standard or make any effort to demonstrate it is met here. The only circumstance here is a change in General Counsels. That does not constitute the type of extraordinary circumstance contemplated by the rule.

CONCLUSION

For the above-described reasons, the Charging Party, respectfully requests that its motion to strike the GC's Position Statement be granted.

DATED AT Oakland, California, this 14th day of May 2019.

Respectfully submitted,

/s/ Susan K. Garea

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 14, 2019, a copy of the foregoing CHARGING PARTY'S MOTION TO STRIKE THE GENERAL COUNSEL'S STATEMENT OF POSITION IN RESPONSE TO THE REMAND OF THE D.C. CIRCUIT in NLRB Case 32-CA-160759 was served by electronic mail on the following case participants:

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